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No. 576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WILLIAM JOSEPH RUSSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Judgment and Opinion of the Court Below	2
Jurisdictional Statement	2
Questions Presented for Review	2
Statutes Involved	3
Statement of the Case	4
Reasons Relied on for the Allowance of the Writ	4
Conclusion	9
Appendix A—Opinion	11
Appendix B—Order denying Petition for Rehearing *en banc*	21
Appendix C—Title 26 U.S. Code	22

AUTHORITIES CITED

Cases

Edwards v. United States, 334 F.2d 360, 5 Cir. (1964) p. 368	5, 6
Edwards v. United States, 321 F.2d 324	6
Hargrove v. United States, 5 Cir. 1933, 67 F.2d 820, 90 ALR 1276	5
Ingram v. United States, 360 U.S. 72, 79 S.Ct. 1314, 3 L.Ed. 2d 1503 (1959)	7
Spies v. United States, 1943, 317 U.S. 492, 63 S. Ct. 364, 87 L.ed. 418	5, 7
United States v. Chramek, 331 F.2d 380, 4 Cir. (1964)	8
Wardlaw v. United States, 5 Cir., 1953, 203 F.2d 884	5, 6

Other Authorities

Title 26 U. S. Code, Section 7203	5

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, Chief Justice and Associate Justices Of The Supreme Court of The United States:

Your petitioner, William Joseph Russo, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On August 6, 1964, the United States Court of Appeals for the Seventh Circuit, by a 2 to 1 decision, affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois. The case is reported at 335 F. 2d 299, and is appended herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a jury trial, defendant was convicted of receiving wagers and willfully failing to register and file a return with the Internal Revenue Department in violation of Section 7203, Title 26, U.S. Code.

On appeal, the judgment was affirmed, 335 F. 2d 299. A timely petition for rehearing *en banc* was denied on September 11, 1964. (Appendix B).

The jurisdiction of this court is invoked under the provisions of Section 1254 (1) Title 28, U.S. Code.

QUESTIONS PRESENTED FOR REVIEW

1. Was the statutory requirement under Section 7203, Title 26, U.S. Code that a wilful failure to file a return with the Director of Internal Revenue satisfied when the government failed to produce any proof that defendant was aware of the law requiring him to file such a return?

2. Were the totality of circumstances here such that the jury could properly infer that defendant knew of the existence of the facts when:

   (a) Defendant was observed taking a few $2 bets at a race track from different individuals; and

(b) When arrested and asked if he had a "wagering tax stamp" by the agent, defendant replied, "I don't know what you are talking about"?

3. Where the trial court found that the testimony of the agent was ". . . that he (defendant) did not know anything about the law, isn't that right, the wagering tax stamp?" may the Court of Appeals hold that the trial court's interpretation of the statement was not binding on the jury?

4. Where the jury found the defendant not guilty under Count I charging the defendant with failure to pay a special tax for being in the business of accepting wagers, a violation of Section 4411, Title 26 U.S. Code, may the same jury find the defendant guilty under Section 4412, Title 26 U.S. Code requiring registration with the Internal Revenue District in the event such person was required to pay a special tax?

STATUTES INVOLVED

Sections 4411, 4412, and 7203, Title 26 U.S. Code. (Relevant portions set out in Appendix "C")

STATEMENT OF THE CASE.

On four separate days, August 20, 21, 23 and 24, 1963, an Internal Revenue agent observed the defendant engaged in conversations with various individuals and saw currency passing from the individuals to the defendant who would then make notations on a piece of paper (A. 3-5).[1] On August 20, 1963, the agent gave defendant $4 and said he wanted the No. 7 horse in the sixth race. Defendant said, "No. 7, 2 and 2" and made some notations on a piece of paper. On August 21 and August 23, the agent gave the defendant $6 and $10 respectively.

Internal Revenue agent Pollitz testified that at the time of defendant's arrest on August 24, 1963, "He (the defendant) was asked if he had a wagering tax stamp". The agent said, "He replied he doesn't know. 'I don't know what you are talking about.' " (A. 6).

The agent advised the defendant of his constitutional privilege not to answer questions, and the defendant refused to answer any further questions (A. 6-7).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The question which this case poses is a recurring one and is one which has vexed the lower courts.

In substance, the question is whether or not a defendant may be found guilty of wilful failure to register under the gambling tax laws, Section 7203, Title 26, U.S. Code, where the only proof made by the government is that the defendant received some wagers on a few occasions.

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[1]A. refers to Appellant's Appendix.

The evidence here supports the government's contention that the petitioner was engaged in receiving wagers on horses. Taking the government's proof in its best light, the petitioner must concede that portion of the government's case. But there is no stealth here, no furtiveness, no large operation, and no concealment of activities. The defendant even took a bet from a stranger, agent Wheeler, whom the defendant had never seen before (A. 3-4).

The only evidence that bore upon the petitioner's knowledge of the requirement to obtain a wagering tax stamp is contained in the conversation which Internal Revenue Agent Pollitz had with the Petitioner at the time of petitioner's arrest. The government attorney asked whether there was any conversation with the defendant at the time of the arrest. Agent Pollitz advised the court and jury, "He was asked if he had a wagering tax stamp and the defendant replied, 'I don't know what you are talking about.'" (A. 6).

Section 7203, Title 26 U.S. Code makes it a crime only if a person ". . . wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information at the time or times required by law or regulations . . ."

Judge John R. Brown dissenting in *Edwards* v. *United States*, 334 F.2d 360, 5 Cir. (1964) stated, p. 368, "Congress can, of course, prescribe that the failure to pay the tax is a crime and thus eliminate the element of a *knowing* duty to pay. But as long as *Spies* v. *United States*, 1943, 317 U.S. 492, 63 S. Ct. 364, 87 L.ed. 418; *Hargrove* v. *United States*, 5 Cir. 1933, 67 F.2d 820, 90 ALR 1276; and *Wardlaw* v. *United States*, 5 Cir., 1953,

203 F.2d 884, stand, I do not think we may read out *knowledge* by a so-called presumption, rebuttable or otherwise, that an accused knows the law and knowing the laws knows he had a duty to pay." (Emphasis in the Opinion).

In the dissenting opinion in this case, Judge Schnackenberg agreed with Judge Brown, stating, 335 F.2d 299, 302:

> "I find no evidence in the record of wilfulness in defendant's failure to register and file a return. While it was his duty to do so and we can, momentarily indulge in the aphorism that everyone is presumed to know the law, yet the act, in its definition of the offense says '*wilfully* fails to . . . make such return' (Italics supplied)" (Emphasis in the Opinion).

The dissenting judge further pointed out, p. 303, that "a significant thing about this record is that there is no evidence that defendant *did know* what the agent was talking about. Certainly, this case lacks any proof showing that defendant knew there was a federal law requiring him to make a return." (Emphasis added).

Edwards v. *United States,* 334 F.2d 360, 5 Cir. (1964) in an *en banc* decision, 4 to 3, reversed on the government's petition for rehearing the earlier holding in *Edwards* v. *United States,* 321 F.2d 324, which decided by a 2 to 1 vote to reverse the judgment of conviction for lack of proof that defendants had knowledge of the requirement to pay the special tax.

The majority in the second *Edwards* decision pointed out, 334 F.2d at 365, that Frank Edwards was arrested for a bolita lottery offense previously, that he used his house to carry out his gambling operations, that he accepted packages at night in a parking lot behind a bar,

that he hid the can containing lottery paraphernalia under the house next door, that he carried paper sacks under his shirt and that he retrieved paper sacks left for him in the mail box.

The majority opinion in the instant case does not point out nor does it demonstrate the circumstances in the case by which the jury could properly infer that the failure to register on the part of the defendant here was wilful, as required by the statute.

It is unique here that the defendant was found not guilty under Count I, which charged the defendant with wilfully failing to pay the tax on wagers, but found him guilty under Count II charging a wilful and knowing failure to register and file a return in violation of the same section 7203, Title 26 U.S.C., which required the defendant to pay the tax.

What is "wilful" when applied to the gambling tax act? In *Spies* v. *United States*, 1943, 317 U.S. 492, 497, 498, 63 S.Ct. 364, 367, 87 L.Ed. 418, this Court stated:

> "The difference between wilful failure to pay a tax when due which is made a misdemeanor, and wilful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be wilful, and wilful, as we have said, is a word of many meanings, its construction often being influenced by its context."

What circumstantial evidence permits a finding that defendant was wilful in failing to register under the section here involved? In *Ingram* v. *United States*, 360 U.S. 72, 79 S.Ct. 1314, 3 L.Ed. 2d 1503 (1959), there was no direct evidence to show that any of the four defendants

knew of the tax and registration requirements. The evidence showed that as to two of the defendants they had been the principals in a large scale numbers operation conducted over a period of years in the City of Atlanta, while the two other defendants were minor clerical personnel employed by the organization that conducted the gambling operation. Upholding the convictions of *Ingram* and *Jenkins*, this Court reversed as to the other two defendants, Smith and Law, holding that there was insufficient proof that they knew of the liability of their superiors for the taxes. Such circumstances as "the intimate connection of Smith and Law with the operation of the lottery itself, their cooperation in conducting it secretly, and their apparent knowledge that it was conducted at a profit," were held to be "colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes."

Recognition that there must be more than evidence of simple gambling operations before criminal liability is imposed under the section here involved is seen in *United States* v. *Chramek*, 331 F.2d 380, 4 Cir. (1964) where the conviction of a horse-race bookie taking bets over the telephone was sustained on evidence of the gambling activity ". . . together with his admission that he knew of his liability for the occupational tax and that he had not paid it for fear of exposing himself to prosecution by local officers . . ." p. 382.

CONCLUSION.

We respectfully submit that the petition should be allowed in order to decide whether mere evidence of gambling activity, such as here, without more, satisfies the Congressional requirement that the defendant be proved guilty of *wilful* failure to register under the gambling tax law.

Respectfully submitted,

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APPENDIX "A"

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

SEPTEMBER TERM, 1963—APRIL SESSION, 1964

No. 14488

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM JOSEPH RUSSO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

August 6, 1964

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

KNOCH, *Circuit Judge.* Defendant-appellant, William Joseph Russo, was indicted in two counts for violation of Title 26 U.S.C. §7203. Count I charged that he was engaged in the business of accepting wagers and had received such wagers, but had knowingly failed to pay the special occupational tax on wagering for the taxable period ending June 30, 1964. Count II charged that defendant was engaged in the business of receiving wagers and had received such wagers but had knowingly failed to register and file a return with the District Director of Internal Revenue.

After trial, the jury found defendant guilty only of Count II. He was sentenced to serve six months and to pay a fine of $1,000. This appeal followed.

Defendant states the contested issues as follows:

1. Whether there is sufficient evidence in the record to support a guilty finding under Count II.

(a) There was no proof that the defendant was aware of the federal tax and that he "wilfully" refused to pay it.

(b) There is no proof that defendant failed to file a tax at the time when the law required him so to do.

3. Whether the jury's verdict in finding the defendant not guilty under Count I which charged the defendant "was engaged in the business of accepting wagers" and that he "did receive wagers on his own behalf" negated and vitiated the verdict of guilty under Count II wherein the defendant was charged with being in the business of accepting wagers and that by reason therefore he was required to register with the District of Internal Revenue and to file a return, Form 11C.

4. Whether it was a violation of the defendant's right to a fair trial to permit the prosecutor to produce evidence that the defendant refused to answer certain questions of the interrogating agent when the defendant was arrested.

The government asserts that defendant may not now raise the issue that the evidence was insufficient to sustain the verdict because there was no motion for acquittal at the close of all the evidence. *U.S.* v. *Jones*, 7 Cir., 1953, 204 F. 2d 745, 748, cert. den. 346 U.S. 854. Nevertheless, the government argues that viewed, as it must be, in the

light most favorable to the government, the evidence does support the conviction on Count II.

Stanley Wheeler, an Internal Revenue Agent, testified that he observed defendant, on four different days at the race track engaging in conversations with various individuals who passed currency to defendant, who then entered notations on a piece of paper.

Agent Wheeler testified further that he himself approached defendant on each of the four days prior to certain races, gave defendant money, which defendant accepted, stated that he "wanted" certain horses, variously referring to them by name or number and indicating the allocation of the money, *e.g.* he said "I want No. 9, Major Byrd, 3 and 3" passing over $6.00. The defendant on each occasion repeated the gist of Agent Wheeler's statement and made notations on a card or piece of paper.

Some of Agent Wheeler's evidence was corroborated by another Internal Revenue agent, Howard Pollitz, who observed defendant and Agent Wheeler on August 24, 1963, after which Agent Pollitz arrested defendant.

Defendant stresses the fact that when arrested he was asked if he had a wagering stamp and he answered "I don't know what you are talking about." He contends this showed his ignorance of the law. Later in the course of discussing instructions concerning possible contradictions in defendant's testimony, defense counsel asserted that there had been no showing that defendant had made statements inconsistent with his present testimony. The Trial Court said:

> As I recall it, the testimony of the Agent was that he didn't know anything about the law, isn't that right, the wagering tax stamp?

Defendant argues that the government failed to prove that he knew of any obligation to pay the tax; that not knowing of its existence, he could not be guilty of wilfully refusing to comply with the law.

However, there was ample evidence that defendant was engaged in accepting wagers. Defendant testified that he was an expert on trotting races, attending almost nightly for two or three years; that he associated with bettors. He described himself as a "horse player" and a "tout" with a regular clientele of customers whom he advised and for whom he made bets at the race track. He said he knew what a "bookmaker" was and that he was not one, but instead was a tout; that he did not take bets for his or anyone else's profit.

The Trial Court's interpretation of the statement "I don't know what you are talking about" was not binding on the jury who may, with equal justification, have decided that defendant was denying, as he more clearly denied later, that he was a bookmaker or that he accepted wagers.

The jury might quite reasonably infer from the evidence here that defendant "had been in the business for so long and associated so frequently with known gamblers that he should have known of the requirement," unlike John McGonigal in *U.S.* v. *McGonigal,* D., Del., 1963, 214 F. Supp. 621, 622, on which defendant relies.

Marion Hope Hamilton, Assistant Chief of Records in the Chicago Office of the Internal Revenue Service, supervising maintenance of files and federal tax returns, testified that the "Special Tax Return and Application for Registering" (form 11C) was kept under her control and supervision.

Defendant was arrested August 24, 1963, on the basis of activities observed on that day and on the few days preceding. The indictment was returned by the August, 1963, Grand Jury, and trial began October 31, 1963.

Miss Hamilton testified, on October 31, 1963, that, at the request of the United States Attorney's office, she conducted a search of the files for returns of form 11C under the names of William Joseph Russo or William J. Russo, for the tax year ending June 30, 1964, on October 28 and October 29, and was unable to find one. Because she did not state the year in which she made her search, defendant contends that we may not assume that she made it in 1963, because, for all we know to the contrary, she may have made it in 1962. Defendant argues that there was no proof he failed to file a tax form within the period prescribed by law.

The jury was instructed that the return must be filed to cover the period beginning with the first day of the calendar month in which one engages or expects to engage in a business making him liable for the tax and ending with the following June 30th. Viewing Miss Hamilton's testimony in context, we conclude that the government sustained its burden on this point.

Defendant also contends that the jury could not have found him guilty under Count II, having already found him not guilty under Count I. Consistency in verdicts on the several counts of an indictment is not essential. Each count is viewed as a separate indictment. *Dunn* v. *U.S.*, 1932, 284 U.S. 390, 393, and cases there cited. A verdict of acquittal on one count does not invalidate a verdict of guilty on another count, even where the same evidence is offered in support of each count. *U.S.* v. *Bazzell*, 7 Cir., 1951, 187 F. 2d 878, 884, cert. den. 342 U.S. 849, and cases there cited.

Defendant's failure to renew at the close of his own evidence, the motion for judgment of acquittal he made at the close of the government's evidence, operated as a waiver of the earlier motion. The sufficiency of the evidence to take the case to the jury is not open for review. *Clark* v. *U.S.*, 5 Cir., 1961, 293 F. 2d 445, 448; *U.S.* v. *George*, 6 Cir., 1963, 319 F. 2d 77, 79. In any event, we must conclude from our view of the record that the evidence here did support the conviction on Count II.

When Agent Pollitz testified that after arresting defendant, he advised defendant of his constitutional privilege to remain silent, the prosecutor asked, "What next, if anything, did you do?" Agent Pollitz answered, "I then asked him questions which he refused to answer." The defense objection that this was "highly improper" was overruled. Defendant argues that the prosecutor must have known what the answer would be and improperly elicited it.

The prosecutor had been presenting a chronological account of Agent Pollitz's actions by repeatedly asking what, if anything, had been done next. In most instances Agent Pollitz answered with a description of his own actions, *e.g.* "We escorted him out of the park," and "We escorted him out of the park and took him in Special Agent Lorenz' automobile".

In several instances where Agent Pollitz had asked questions of defendant, defendant, as indicated above, had answered, and Agent Pollitz testified as to those answers. Defendant had also freely given his name, address and age. Continuing along the same line, the prosecutor received the response that the defendant had refused to answer other questions.

Later, in covering the events at the Assistant U.S. Attorney's office, Agent Pollitz testified that he asked defendant if he accepted wagers and defendant replied, "I don't know what you are talking about." The prosecutor asked whether there had been any other conversation at that time and Agent Pollitz answered, "I asked him other questions but he refused to answer." The prosecutor then asked what else, if anything, Agent Pollitz had done and Agent Pollitz went on to describe his search of defendant's person and the various government exhibits thereby obtained, including several slips of paper bearing notations, and $638.50 in currency, one $10 bill being marked with an "S". Agent Wheeler had testified that he gave defendant a $10 bill marked with an "S".

In defendant's view, this testimony of his refusal to answer questions denied him a fair trial and violated the spirit of the Fifth Amendment to the Constitution. There was no undue emphasis of this point, however. Apart from the fact that defendant did testify at his trial and hence there could be no comment on his failure to do so, we think in all the circumstances of this examination, admission of this testimony did not constitute error.

We have considered all other arguments advanced on behalf of the defendant, but we remain satisfied that the judgment of the District Court should be affirmed.

AFFIRMED.

CIRCUIT JUDGE SCHACKENBERG, dissenting.

The record in this case compels me, although reluctantly, to dissent.

The jury found the defendant not guilty under count I, which charged him with willfully and knowingly failing to pay the tax on wagers, in violation of 26 U.S.C.A. § 7203. However, the jury found defendant guilty, under count II,

of willfully and knowingly failing to register and file a return, in violation of the same section.

I find no evidence in the record of willfulness in defendant's failure to register and file a return. While it was his duty to do so and we can, momentarily, indulge in the aphorism that everyone is presumed to know the law, yet the act, in its definition of the offense says, "*willfully* fails to * * * make such return." (Italics supplied.)

Here there is a total absence of evidence of willfulness. Pollitz, an internal revenue agent who testified for the government, said that, when he arrested defendant, "He [defendant] was asked if he had a wagering tax stamp," and defendant "replied he doesn't know. 'I don't know what you are talking about.' "

A significant thing about this record is that there is no evidence that defendant *did know* what the agent was talking about. Certainly this case lacks any proof showing that defendant knew there was a federal law requiring him to make a return. This becomes abundantly clear when we compare the facts in this case with those in our recent decisions in *United States* v. *Durant*, 324 F.2d 859 (1963), and *United States* v. *Keig*, ... F. 2d ..... (No. 14417, June 16, 1964). In each of these cases the defendant unsuccessfully contended that his violation of the revenue laws had not been willful. In both *Durant* and *Keig*, however, the evidence clearly showed facts which we held supported the charge of willfulness. In *Durant*, for instance, we pointed out, at 862, that prior to the years involved in the indictment, a revenue agent discussed with defendant the practice of taking corporate tax deductions for personal expenditures and said this practice was improper; also, defendant himself testified that another

agent had discussed with him about personal items that the corporation had paid for and that he had read and signed a protest against the latter agent's ruling, prepared by his lawyers. At 863, we said:

> "As an abstract proposition, we would agree that no amount of laxity in and of itself constitutes willfulness. However, in the case at bar, we believe that the district court properly recognized the additional factors revealed by the records, tending to prove a willful intent: (a) defendant knew the corporation was paying his expenses, (b) the payments were not considered loans by the parties, (c) defendant knew the corporate payments were income to him; and therefore properly found that defendant willfully failed to include them in his returns.
>
> * * *
>
> "Whether defendant willfully attempted to defeat and evade taxes in this case presented a question for the trier of the facts. There was substantial evidence before the court to support the result which it reached. * * *"

In *Keig*, defendant was charged with willful failure to make income tax returns in violation of 26 U.S.C.A. § 7203.

In this court government counsel has furnished us with the recent *en banc* opinion of the Fifth Circuit in No. 19827-8, *Edwards* v. *United States*, ... F. 2d ..... There two defendants were convicted of violating 26 U.S.C.A. § 7203 by willfully failing to register for and pay a gambling tax. The majority opinion, from which three judges dissented, points out that

> "* * * since the evidence conclusively establishes that the defendants failed *both* to register for and to pay the tax, the test of willfulness is met. * * *"[1]

[1] In the case at bar the jury by its verdict found defendant not guilty on the count I charge that defendant failed to pay the tax.

and stated:

> "In the instant case there is no direct proof that the defendants knew of the duties imposed by the federal gambling tax statute—they neither admitted nor denied such knowledge, * * *."[2]

In *Edwards* there was affirmative evidence that defendant Frank Edwards was arrested for a bolita offense in 1949, when he rented a house from someone else, used it to carry out his gambling operation, accepting packages at night, hiding a can containing lottery paraphernalia, carrying under his shirt paper sacks left for him in the mail box. The court commented, "This long experience in the lottery business and concealment of operations is enough under the *Ingram* case to allow the jury to infer that Frank Edwards was aware of the wagering tax."

In the case at bar there is no evidence of stealth or any earmarks of violation of the law which might be indicative, if present, of the knowledge by defendant that he was engaged in violation of a federal law.

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[2] In the case at bar there is implicit denial of knowledge of the gambling tax statute in the only evidence bearing on this subject, which is that at the time of his arrest, defendant stated that "he doesn't know. 'I don't know what you are talking about' ".

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, September 11, 1964

Before

Hon. John S. Hastings, *Chief Judge*

Hon. F. Ryan Duffy, *Circuit Judge*

Hon. Elmer J. Schnackenberg, *Circuit Judge*

Hon. Win G. Knoch, *Circuit Judge*

Hon. Latham Castle, *Circuit Judge*

Hon. Roger J. Kiley, *Circuit Judge*

Hon. Luther M. Swygert, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. No. 14488 WILLIAM JOSEPH RUSSO, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court sitting *en banc* that the petition for a rehearing of this cause *en banc* be, and the same is hereby, Denied.

APPENDIX "C"

TITLE 26, U.S. CODE

1. "§ 4411. *Imposition of tax*

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

"§ 4412. *Registration*

"(a) *Requirement.*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district —* * *."

"§ 7203. *Willful failure to file return, supply information, or pay tax*

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 576

WILLIAM JOSEPH RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 11-20) is reported at 335 F.2d 299.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1964. A petition for rehearing *en banc* was denied on September 11, 1964. The petition for a writ of certiorari was filed on October 10, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for wilfully failing to register and file a tax return while engaging in the business of receiving wagers.

STATUTE INVOLVED

26 U.S.C. 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on the second count of a two-count in-

dictment (App. 1-2)[1] charging that although he was in the business of receiving wagers on his own behalf and on the behalf of others and had received such wagers, petitioner wilfully and knowingly failed to register and file a tax return as required by law, in violation of 26 U.S.C. 7203 (App. 1-2, 13).[2] Petitioner was sentenced to six months' imprisonment and fined $1,000 (App. 2). The court of appeals affirmed, one judge dissenting (Pet. App. A 11-20; 335 F.2d 299).

The pertinent evidence may be summarized as follows:

Internal Revenue Agent Stanley Wheeler testified that on the evenings of August 20, 21, 23, and 24, 1963, at a racetrack in Cook County, Illinois, he saw petitioner talking to and receiving money from various individuals and, upon receipt of the funds, making notations on various pieces of paper. On each of these days the agent, prior to a particular race, approached petitioner, stated he wanted a certain horse and gave petitioner money. For example, just before the sixth race on the evening of August 20, the agent gave petitioner $4.00 and said he wanted the "No. 7 horse." Petitioner took the money and responded "No.

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[1] "App." designates petitioner's Appendix in the court of appeals now on file with the Clerk of this Court. Also on file with the Clerk is the Appendix to the government's Brief in the court below (designated "G. App.") and separately backed papers containing the proceedings in the court of appeals.

[2] Petitioner was acquitted by the jury on the first count of the indictment, which charged a knowing and wilful failure to pay the special occupational tax on wagers (App. 1, 13).

7, 2 and 2" and made notations (App. 3-4). Another Internal Revenue agent (Howard Pollitz) witnessed petitioner's activities at the track on the night of August 24. He saw petitioner receive money from various individuals including Agent Wheeler (App. 6). Shortly thereafter, that same evening, agent Pollitz arrested petitioner and asked him if he had a wagering tax stamp. Petitioner replied, "I don't know what you are talking about" (App. 6).[3] At the time of his arrest, petitioner was searched and found to possess, *inter alia*, some $638.00 in currency, racing tickets purchased at the track, and numerous cards. These papers bore various notations indicating the horses that were running, the amount and type of wagers and a "recap sheet" of the week's wins or losses. Agent Wheeler, who had a great deal of experience with horse betting, characterized these papers as "wagering paraphernalia" (App. 8-9).

The government also adduced evidence that petitioner had failed to register or file a "special tax return and application for registering" for the tax year ending June 30, 1964 (App. 3).

Petitioner testified in his own defense that he was an "expert" on trotting races, and went to the races regularly for two or three years. He described himself as a "horse player" and a "tout", with a regular clientele of customers whom he advised, for whom he made bets at the race track, and from whom he generally received some money when he picked a win-

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[3] Petitioner replied similarly when he was later asked if he accepted wagers (App. 7).

ner. He stated that he knew what a "bookmaker" was but denied that he was one or that he ever took bets for profit. He said that after he took money from Agent Wheeler, he made a bet for him at the pari-mutuel window at the race track.[4] He explained the items taken from him at the time of his arrest as used for handicapping the horses (App. 10-11; G. App. 1-5).

In the course of discussing instructions concerning possible inconsistencies between petitioner's trial testimony and earlier statements to the agents, the trial court said: "As I recall it, the testimony of the agent was that he [the petitioner] didn't know anything about the law, isn't that right, the wagering tax stamp?" (App. 13).

ARGUMENT

Petitioner does not deny that the evidence showed that he was accepting wagers at the track on a regular basis. Nor does he argue that in determining whether he wilfully failed to register and file a tax return the court of appeals tested the jury verdict under an improper standard. His contention is only that the court below was incorrect in ruling that the evidence was sufficient to meet that test. Accordingly, there is no issue of significance warranting review

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[4]Agent Wheeler testified that after he placed a bet with petitioner, he did not see him go to the pari-mutuel window (App. 12-13). On the evening of August 24 before the fifth race Agent Wheeler had given petitioner a "marked" $10 bill (App. 5). This bill was included among the money found on petitioner's person following his arrest after the sixth race that same evening (App. 8).

by this Court; rather, the decision involves the application of an unchallenged general principle to the particular circumstances of this case.

We start with the premise that proof of wilfulness in the present context requires proof of knowledge of the legal obligation to register and file a tax return. See, *e.g.*, *Yarborough* v. *United States*, 230 F.2d 56, 61 (C.A. 4), certiorari denied, 351 U.S. 969; *Hargrove* v. *United States*, 67 F.2d 820, 823 (C.A. 5); *Haner* v. *United States*, 315 F.2d 792, 793 (C.A. 5). But there is no requirement that such proof of wilfulness be direct rather than circumstantial. *Holland* v. *United States*, 348 U.S. 121, 139. Indeed, in *Ingram* v. *United States*, 360 U.S. 672, this Court affirmed conspiracy and substantive convictions against the two principal petitioners relating to their gambling tax obligations even though "There was no direct evidence to show that any of the petitioners knew of these taxes" (360 U.S. at 674), on the ground that the evidence in full permitted such a conclusion. See, also, *Edwards* v. *United States*, 334 F.2d 360 (C.A. 5), reversing, *en banc*, *Edwards* v. *United States*, 321 F.2d 324.

While the factual question here is a close one, the court of appeals properly found that the evidence supports the verdict. Petitioner apparently operated as a bookmaker at the track with a regular clientele of bettors. He himself admitted that he was an expert horse player who attended the trotting races almost daily. While it is true that petitioner, when asked if he had a tax stamp, answered that he did not know what the agent was talking

about, it is equally true that he subsequently gave the same answer when asked if he accepted wagers. The jury could reasonably find that the answer was no more than an effort at evasion in both instances and concludes that anyone so intimately connected with the business of horse betting, who regularly dealt with gamblers, must have been aware of his tax obligation. Cf. *United States* v. *McGonigal*, 214 F. Supp. 621, 622 (D.Del).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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[5] The fact that the jury acquitted petitioner on count one of the indictment does not affect the validity of his conviction on the second count. *Dunn* v. *United States*, 284 U.S. 390, 393-394.

U. S. GOVERNMENT PRINTING OFFICE: 1964 749437 379